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Supreme Court, U.S.
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No. 89-1978

In The

Supreme Court of the United States

October Term, 1990

REX A. SHARP, KERRY McQUEEN, and JAMES H. MORAIN, as individuals, NEUBAUER, SHARP, McQUEEN, DREILING & MORAIN, P.A., as a firm, and ALL OTHER LAWYERS AS A CLASS REQUIRED BY THE STATE OF KANSAS TO REPRESENT KANSAS INDIGENT CRIMINAL DEFENDANTS,

Petitioners,

v.

THE STATE OF KANSAS,

Respondent.

PETITIONERS' REPLY BRIEF

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REASONS FOR GRANTING THE WRIT

The Kansas Supreme Court unanimously found that the old Kansas court appointment system violated the Constitution because it took Fifth Amendment property (services and money) from court appointed lawyers without just compensation. *State ex rel. Stephan v. Smith*, 242 Kan. 336, 370, 742 P.2d 816 (1987). The *Smith* court therefore ordered prospective relief. *Id.* at 383. The State argued in its Brief to this Court: "Prior to *Smith* the state was not constitutionally obligated to pay any compensation to indigent criminal defense attorneys." (Respondent's Brief at 2). The argument is wrong. The State has always been obligated to pay for taking property. The constitutional obligation to pay did not begin with the *Smith* court's finding, rather the obligation to pay began when the unconstitutional act and regulations were enacted. *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 319-21 (1987).

The State claimed it completely denied Petitioners' harsh statements concerning the State Board of Indigent Defense Services, but the State did not actually make any specific denials, nor could it since the "harsh statements" were unanimous findings of fact made by the Kansas Supreme Court in *Smith*. Instead of denying the facts, the State tries to make an excuse, and perhaps even its defense, by claiming that the State experienced "hard times" and was "broke". If Petitioners were ever afforded the right to conduct discovery it is believed the facts would show (1) the Board never requested a large enough budget to pay court appointed counsel a just fee, (2) the legislature refused to appropriate enough money, and, (3) to make matters worse, when the Board's budget was cut,

the Board selectively cut court appointed counsel fees even more instead of other budget items. The State cannot ignore the constitutional obligation to pay just compensation for years and then defend on the basis that it did not appropriate enough money to pay just compensation or that it began paying more compensation when it was forced to do so. It is also no defense to assert that the State paid some token compensation. The Constitution requires payment of "just" compensation.

To clarify the State's history of these proceedings, Petitioners initially sought relief from the State's unconstitutional conduct in federal court to avoid the political gamesmanship evident in this state court case, but the case was dismissed on Eleventh Amendment grounds. *Sharp, et al. v. State, et al.*, No. 88-1001-K (D. Kan. Mar. 16, 1988), *aff'd, Sharp, et al. v. State*, No. 88-1553 (10th Cir., May 7, 1990) (petition for writ of certiorari to be filed). When the federal court case was dismissed, Petitioners filed this case in state court. Since the Kansas Supreme Court suggested that the inverse condemnation theory had not been adequately presented to the trial court in this case (though it decided the issue anyway), Petitioners refiled suit in State district court to again assert the inverse condemnation claim. The State in the refiled state district court action claimed that the inverse condemnation issue had already been decided by the Kansas Supreme Court in this case and is therefore *res judicata*. Whereas, before this Court, the State claims that the inverse condemnation issue was not adequately raised and should not be considered by this Court. Thus the State desperately takes inconsistent positions to avoid a decision by any court on the inverse condemnation issue.

The Kansas Supreme Court did not skirt the issue on procedural grounds, rather it decided the substantive issue.

The core substantive issue in this case is what remedy, if any, is available for an unconstitutional taking of property? *Smith* held an attorney's services and money were Fifth Amendment "property". 242 Kan. 370. *Smith* also held that the old Kansas court appointment system constituted a "taking" of the attorney's property, which is also an issue in this case. *Id.* Since just compensation was not paid under the old court appointment system, *Smith* held the system unconstitutional and invalidated the act and regulations implementing the system. *Id.* at 383. When considering the remedy available for the unconstitutional taking, the Kansas Supreme Court held in this case that only invalidation of the old system was available. The Fifth Amendment says "just compensation" is the remedy. This Court in *First Lutheran Church* held invalidation insufficient and that "just compensation" from the effective date of the unconstitutional act and regulations must be paid. 482 U.S. at 319-21. The Kansas Supreme Court attempted to distinguish *First Lutheran Church* by claiming it was only a real property case, and that taking other types of Fifth Amendment property did not require just compensation. The distinction is without legal significance. In fact, the State in its Brief to this Court did not even mention the distinction or attempt to justify it. Instead, the State again attempted to avoid (or confuse) the issue by raising other meritless arguments on the inverse condemnation issue which were not relied on by the Kansas Supreme Court below. (Respondent's Brief at 8-10). The State made no attempt to defend the

Kansas Supreme Court's opinion on inverse condemnation because he Kansas Supreme Court's decision is absolutely indefensible.

Therefore, the Petition for Writ of Certiorari should be granted, the Kansas Supreme Court's decision below should be reversed summarily, and the case remanded for discovery and trial on the merits.

Respectfully submitted,

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